No. 80-1220

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOROTHY JEAN RAY, PETITIONER

v.

S. DAVID FREEMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly concluded that the Tennessee Valley Authority's decision not to hire petitioner was not gender discriminatory or otherwise in violation of 42 U.S.C. 2000e-16.

2. Whether petitioner's failure to raise events after February 20, 1974, as the basis for her discrimination claim constituted a deliberate bypass of the exclusive administrative remedies provided by 42 U.S.C. 2000e-16.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-29 to A-52) is reported at 626 F. 2d 439. The decisions of the district court (Pet. App. A-20 to A-28) and the United States Civil Service Commission Appeals Review Board (Pet. App. A-1 to A-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1980 (Pet. App. A-29). A petition for rehearing was denied on October 22, 1980. The petition for a writ of certiorari was filed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner received a B.S. degree in chemistry in 1965, but ceased working in 1967. In June 1973, petitioner applied for a chemist's job with the Muscle Shoals, Alabama, offices of the Tennessee Valley Authority ("TVA"). Because of her minimal work experience, petitioner was eligible only for a limited number of chemist's positions. At the time of her application, petitioner did not indicate on the application form her willingness to accept a subprofessional job and did not meet with TVA personnel officials, although she was entitled to do so. Subsequently, in January 1974, petitioner contacted a TVA official and expressed her unhappiness with TVA's failure to hire her. The personnel officer explained that petitioner was not qualified for the advanced chemist positions and petitioner then stated that she would be willing to accept a subprofessional position. In February 1976, petitioner was hired as a subprofessional, and in August 1977, she was promoted to a chemist's position (Pet. App. A-1 to A-3, A-8 to A-10, A-24 to A-26, A-34 to A-36).

However, in February 1974, prior to her hiring, petitioner filed a complaint with the agency, alleging that TVA's failure to hire her was the result of gender discrimination and a reprisal for her involvement in her husband's claim of religious discrimination against TVA.[1] In particular, petitioner claimed that three male chemists had been hired by the Muscle Shoals facility between June 1973 and February 1974, and that there were no female chemists at that facility. Petitioner's administrative complaint related only to the period prior to February 20, 1974, and was not amended after that date. Following TVA's investigation and denial of petitioner's claims (see 29 C.F.R. Part 1613), she requested an evidentiary hearing before a Civil Service Commission Complaint Examiner (Pet. App. A-1 to A-3, A-8 to A-10, A-24 to A-26, A-34 to A-36).

The hearing officer determined that TVA's refusal to hire petitioner as a chemist was neither discriminatory nor an act of reprisal. Specifically, the evidence showed that the three hirees were recent chemistry school graduates with extensive work experience at the TVA Muscle Shoals facility through a nondiscriminatory TVA work-study program. This cooperative study program involved 50% female participation and one of the female participants had in fact been offered a job at Muscle Shoals.[2] In addition, during the relevant time period, TVA reinstated a former agency chemist who was eligible for veteran's preference

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[1]Petitioner's husband had been laid off by TVA in March 1973 as part of a reduction in work force. His claim of religious discrimination has been found to be without merit. See *Ray* v. *TVA*, No. 74-6-601 NW (N.D. Ala. Nov. 12, 1974, and Jan. 9, 1975), appeal dismissed, 521 F. 2d 812 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976).

[2]She declined in favor of graduate study (Pet. App. A-13). The evidence further indicated that TVA would not have made these offers except to ensure the long term viability of its student cooperative program (*id.* at A-26, A-49 n.5).

and hired a female chemist at an advanced level. All of these chemists had substantially greater work experience than petitioner, who had last worked or studied chemistry in 1967 (Pet. App. A-3 to A-5, A-12 to A-17, A-25 to A-28). Accordingly, the hearing examiner found no evidence of discrimination and recommended the dismissal of petitioner's complaint, and TVA concurred in these findings and recommendations.

On review, the Civil Service Commission Appeals Review Board affirmed, finding that petitioner's "nonselection [did not] result[] from discrimination because of her sex or reprisal for her husband having previously filed a discriminatory complaint against the agency" (Pet. App. A-17). The Board also declined to consider petitioner's claims regarding post February 20, 1974, events since petitioner's administrative complaint solely concerned events prior to that date (*id.* at A-10 to A-11). The Board noted that its decision did not preclude petitioner from filing a separate complaint regarding TVA's actions regarding petitioner after February 20, 1974.

2. Petitioner then filed this suit in the United States District Court for the Northern District of Alabama, claiming that TVA's failure to hire her in June 1973 violated Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16. The district court granted partial summary judgment for defendants with regard to all claims involving acts after February 20, 1974—the date of petitioner's amended administrative complaint. Following a trial, the district court made a de novo determination that petitioner was not discriminated against on the basis of gender or because she had aided her husband in his prosecution of a discrimination claim against TVA. The court upheld TVA's nondiscriminatory hiring preference for recent graduates who had worked at TVA through the cooperative program. The court also found that TVA's

reinstatement of a veteran's preference, male employee, who had recent TVA experience and required no training for the job in question, was not discriminatory (Pet. App. A-25 to A-28, A-38 to A-41).

3. On appeal, the court of appeals affirmed (Pet. App. A-42 to A-52). The court first held that the district court properly declined to consider petitioner's complaints regarding events after February 20, 1974, except as evidence corroborating petitioner's other claims. Relying on *Brown* v. *GSA*, 425 U.S. 820 (1976), the court of appeals explained that "the administrative review apparatus provided by Title VII is a requisite for judicial review of a discrimination claim" (Pet. App. A-42). Otherwise, the court of appeals observed (*id.* at A-43 to A-44), claimants would raise charges for the first time in the district court thereby bypassing and undermining the comprehensive administrative procedures mandated by Congress. Accordingly, the court of appeals upheld the dismissal of petitioner's post February 20, 1974, claims, which petitioner had purposely failed to submit to the agency despite admonitions to do so (*id.* at A-43 to A-46).

The court of appeals also rejected petitioner's pre-February 1974 discrimination claims.[3] The court noted that it was questionable whether petitioner had even established a prima facie case of discrimination (Pet. App. A-49 n.5), but that in any event TVA's evidence amply rebutted that claim. The court observed that the three men hired in professional positions for which petitioner was arguably qualified (as well as a female chemist who was offered a job but did not accept) were all participants in a nondiscriminatory, student-work cooperative program at TVA. Each of these employees had recent chemical training and

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[3]Petitioner did not pursue her reprisal claim on appeal (Pet. App. A-39 n.2).

significant work experience at TVA. In contrast, petitioner had not worked at all for 6-1/2 years prior to her application to TVA. Similarly, the court of appeals found that TVA had properly rehired a former male, veteran's preference employee who was thoroughly familiar with the position and whose capabilities were well known to the agency (Pet. App. A-49 to A-52).

ARGUMENT

1. Petitioner primarily contends (Pet. 17-22) that the district court incorrectly dismissed her discrimination complaint pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(c). But, consistent with the findings of the agency itself, the administrative law judge, and the Civil Service Commission (Pet. App. A-4 to A-5, A-12 to A-17), both courts below correctly found that TVA did not discriminate against petitioner on the basis of gender (*id.* at A-24 to A-28, A-46 to A-52). Further review of these concurrent factual findings is unwarranted. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In any event, petitioner's claims are unfounded. Three of the males hired instead of petitioner were recent chemistry graduates and had extensive experience at TVA through a student cooperative program. Fifty percent of the participants in this program were female, and TVA had offered a job to a female graduate during the relevant time period. Petitioner, in contrast, had no experience at TVA, and had not worked at all in the fast developing field of chemistry for six and a half years. Similarly, both the other male and female chemists hired by TVA at this time had substantial recent work experience. Indeed, TVA had previously employed the male chemist, who was entitled to a bona fide veteran's preference, at the same job for which he was hired.

In short, TVA's employment decisions were "based on the superior qualifications of the person selected" and not the applicant's gender (Pet. App. A-51).

2. Petitioner also contends (Pet. 22-24) that the courts below erred in failing to consider evidence of TVA's discrimination after February 20, 1974. At the outset, we note that the district court did consider these allegations insofar as they tended to corroborate petitioner's pre-February 20 claims, but it found petitioner's evidence unpersuasive (Pet. App. A-43 & n.3). Furthermore, Title VII requires a claimant against the government to exhaust the comprehensive administrative remedies provided by the Act and regulations before seeking judicial review. *Brown* v. *GSA*, 425 U.S. 820, 831-833 (1976); *James* v. *Rumsfeld*, 580 F. 2d 224, 226-227 (6th Cir. 1978); 42 U.S.C. 2000e-16(c) and (d); 29 C.F.R. 1613.281. Here, notwithstanding the explicit admonitions of the administrative law judge and the Civil Service Commission (Pet. App. A-10 to A-11), petitioner failed to file an administrative complaint with regard to separate events of alleged discrimination occurring after February 20, 1974. In light of her intentional bypass of the jurisdictional administrative remedies, petitioner may not now be heard to complain. See, *e.g.*, *Delaware State College* v. *Ricks*, No. 79-939 (Dec. 15, 1980), slip op. 6; *Brown* v. *GSA*, *supra*; *James* v. *Rumsfeld*, *supra*, 580 F. 2d at 227-228; *Bracamontes* v. *Amstar Corp.*, 576 F. 2d 61, 62 (5th Cir. 1978); *Scott* v. *Perry*, 569 F. 2d 1064, 1065-1066 (9th Cir. 1978); *Molybdenum Corp.* v. *EEOC*, 457 F. 2d 935, 936 (10th Cir. 1972); *Danner* v. *Phillips Petroleum Co.*, 447 F. 2d 159, 162 n.3 (5th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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